IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 24, 2008

CASEY SKELTON v. STATE OF TENNESSEE

Appeal from the McMinn County Criminal Court
No. 07-365 Amy M. Reedy, Judge

No. E2007-02818-CCA-R3-CD - Filed August 28, 2008

The State appeals the McMinn County Criminal Court's grant of post-conviction relief to the petitioner, Casey Skelton. The petitioner sought relief from his 2006 McMinn County convictions of two counts of sexual battery by an authority figure on the grounds that his guilty pleas to those charges were unknowing and involuntary and were prompted by ineffective assistance of counsel. The petitioner specifically alleged that trial counsel was deficient in his failure to inform the petitioner about the impact of a conviction of a sexual offense, including the risk that he would permanently be placed on the sex offender registry. The trial court granted relief after an evidentiary hearing, and we affirm.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed in part; Reversed in part

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Robert Steve Bebb; District Attorney General; and James Stutts, Assistant District Attorney General, for the appellant, State of Tennessee.

Douglas A. Trant, Knoxville, Tennessee, for the appellee, Casey Skelton.

OPINION

On August 14, 2006, the petitioner pleaded guilty in McMinn County Criminal Court to two counts of sexual battery by an authority figure, a Class C Felony. *See* T.C.A. § 39-13-527 (2006). The trial court sentenced him as a Range I, standard offender to six years for each count, to be served concurrently, with all but 210 days to be served on probation. On July 26, 2007, the petitioner filed a petition for post-conviction relief, amended on November 7, 2007, arguing *inter alia* that he received ineffective assistance of counsel and that his guilty pleas were not entered knowingly or voluntarily. Following a hearing on November 9, 2007, the trial court granted the petitioner post-conviction relief.

At the post-conviction hearing, the petitioner testified that he was 25 years old when he pleaded guilty, and that the offenses occurred when he was 15 years old and the victims were five years old and six years old, respectively.[1] The charges were originally filed in juvenile court. Before pleading guilty, the petitioner was employed at the Tennessee Valley Authority nuclear plant and was in its training program for nuclear plant assistant operators. He attended college at Cleveland State and obtained an associate's degree in industrial technology of electronics.

Although documents show that the petitioner was indicted for charges reduced from those presented at the juvenile level, he claimed that he did not have a choice in the decision to transfer his case to criminal court. He testified, "I was under the impression the decision was made by the Judge and the [district attorney] and the other people in authority. . . . either I sign it or more than likely they would take me to trial and I would go to prison for a long time."

The petitioner testified that he recalled reading and signing the guilty plea agreement and the waiver of trial by jury. However, the petitioner testified that he would not have pleaded guilty if he had known he would be placed on the sex offender registry for life. His attorney told him that he would be on the list for ten years following his completion of probation. The petitioner denied being in "control" of the victims or babysitting them and claimed the victims were his friends. He admitted that the facts entered at the guilty plea hearing stated that the victims were in his care "in a babysitting supervisory role." He testified that he was coerced to plead guilty by his attorney, who "informed [the petitioner] that if [he did] not take this plea then more than likely [he] would go to prison for up to 50 years."

The petitioner testified that he only spoke to his counsel on court dates. At the time he pleaded guilty, the petitioner thought that counsel had explained to him the charges and all the possible consequences of pleading guilty. However, the day he went to his probation officer's office following the acceptance of the plea to sign up for the Sexual Offender Registry, he was informed that because the crime of sexual battery by an authority figure was considered a "violent offense," his name would never be removed from the registry. The petitioner and his father then repeatedly tried to contact counsel, but he never returned their calls.

The petitioner's trial counsel testified that he had been an attorney for 31 years, including five years as an assistant district attorney and a term as clerk with a federal judge. He practiced solely in the field of criminal defense, with occasional cases requiring him to appear in juvenile court.

Counsel testified that although this case began in juvenile court, the State insisted on transferring the case to criminal court. After some negotiation, an agreement was reached whereby the petitioner would waive the transfer hearing in exchange for the State not including charges of aggravated sexual battery or rape of a child in the indictment. Counsel testified that the thought

[1] The transcript of the petitioner's testimony was not complete because the recording device used by the court reporter malfunctioned. However, neither party claims any relevant testimony was omitted from the transcript.

process behind this decision was that avoiding the more serious charges would give the parties more leeway in potential plea agreements, as the stricter crimes could not result in suspended sentences. Counsel discussed the transfer agreement in detail with the petitioner and his family, including the potential consequences of declining the agreement. Counsel testified that he discussed potential plea deals with the petitioner and his family. He went over the guilty plea and waiver of trial by jury documents with the petitioner, as well as the rights that would be waived by his decision to plead guilty and, in the alternative, the ramifications of potentially going to trial.

Counsel admitted that he erred in advising the petitioner about the sex offender registry. Counsel testified that he "did not realize that at the time. . . . there's another catchall . . . where if you have prior convictions or if this is classified as a violent offense then the sexual offender registry is for life." He admitted that he advised the petitioner to plead guilty to charges that were included in these enumerated violent offenses. Counsel stated that the petitioner never contacted him after the guilty plea hearing to say he had been misinformed about the sex offender registry.

The post-conviction court granted the petition for post-conviction relief, finding that

> [counsel] was admittedly ineffective when he informed Petitioner that he could apply to be removed from the registry after ten years. This was testified to during the hearing on 11/09/07 and it was a part of the Guilty Plea Proceedings. The Court further finds that the erroneous legal advice should have been corrected during the Guilty Plea Proceeding and thus the Court was in error. Based upon the Court's failure to correct the erroneous advice, the Court cannot find that the Petitioner pled guilty knowingly.

The State filed a timely appeal, arguing that the petitioner failed to show that he received ineffective assistance of counsel or that his guilty plea was not knowingly and voluntarily entered. Specifically, the State claims that the petitioner failed to show that but for counsel's advice, he would not have pleaded guilty. The petitioner argues that the post-conviction court properly granted his petition for post-conviction relief.

The post-conviction petitioner is obliged to establish his claims by clear and convincing evidence. *See* T.C.A. § 40-30-110(f) (2006). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998). On appeal, the findings of fact made by the trial court are conclusive and will not be disturbed unless the evidence contained in the record preponderates against them. *Brooks v. State*, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988).

I. Knowing Guilty Plea

The State first argues that the petitioner did in fact enter a knowing and voluntary guilty plea. Our supreme court, in setting forth the standard for identifying a constitutionally valid guilty plea, has noted that "before a trial judge can accept a guilty plea, there must be an affirmative showing that it was given intelligently and voluntarily." *State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711 (1969)). The requirement that guilty pleas be knowing and voluntary may stand independently of the claim that an unknowing or involuntary guilty plea was the result of ineffective assistance of counsel. *See Alan Dale Bailey v. State,* No. M2001-01018-CCA-R3-OC, slip op. at 11 (Tenn. Crim. App., Feb. 8, 2002), *perm. app. dismissed* (July 11, 2002). Our high court has noted that "a plea is not 'voluntary' if it is the product of '[i]gnorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats,'" *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993) (quoting *Boykin*, 395 U.S. at 242-43, 89 S. Ct. at 1712), or if the defendant was "incompetent or otherwise not in control of his mental facilities" when the plea was entered. *Id*.

In all cases, post-conviction relief is only available to address the violation of a constitutional right. T.C.A. § 40-30-103 (2006). This court has previously held that a "petitioner's claim that he should have been informed of the various consequences of being convicted of a sex offense is not a constitution-based claim." *Alan Dale Bailey*, slip. op. at 11; *see also Rickey Sams v. State*, No. 03C01-9511-CC-00368, slip op. at 5 (Tenn. Crim. App., Knoxville, Nov. 14, 1996) (holding that a guilty plea where the petitioner is not informed about the details of parole eligibility, including the possibility of being ineligible for parole, is not a constitution-based claim). Therefore, we reverse the finding of the post-conviction court that the petitioner's guilty plea was not knowing or voluntary, as the petitioner's claim that he was unaware of the tertiary consequences of his guilty plea was not a cognizable claim for post-conviction relief.

II. Ineffective Assistance of Counsel

We now review the adequacy of counsel's performance in assisting the petitioner to enter a knowing and voluntary plea. The Sixth Amendment to the United States Constitution and Article I, section 9 of the Tennessee Constitution both require that a defendant in a criminal case receive effective assistance of counsel. *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975). When a defendant claims ineffective assistance of counsel, the standard applied by the courts of Tennessee is "[w]hether the advice given or the service rendered by the attorney [is] within the range of competence demanded by attorneys in criminal cases." *Summerlin v. State,* 607 S.W.2d 495, 496 (Tenn. Crim. App. 1980).

In *Strickland v. Washington,* the United States Supreme Court outlined the requirements necessary to demonstrate a violation of the Sixth Amendment right to effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052 (1984). First, the petitioner must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and must demonstrate that counsel made errors so serious that

he was not functioning as "counsel" guaranteed by the Constitution. *Id.* at 687, 104 S. Ct. at 2064. Second, the petitioner must show that counsel's performance prejudiced him and that errors were so serious as to deprive the petitioner of a fair trial, calling into question the reliability of the outcome. *Id.*; *Henley,* 960 S.W.2d at 579.

This two-part standard of measuring ineffective assistance of counsel also applies to claims arising out of a guilty plea. *See Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366 (1985). The prejudice component is modified to require the petitioner to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59, 106 S. Ct. at 370; *see also Hicks v. State*, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

The court does not "second guess" tactical and strategic choices pertaining to defense matters and does not measure a defense attorney's representation by "20-20 hindsight." *Henley,* 960 S.W.2d at 579 (quoting *Hellard v. State,* 629 S.W.2d 4, 9 (Tenn. 1982)). Rather, a court reviewing counsel's performance should "eliminate the distorting effects of hindsight . . . [and] evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689, 104 S. Ct. at 2065. "The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation." *Goad v. State,* 938 S.W.2d 363, 369 (Tenn. 1996). On the other hand, "deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation." *Id.*

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must first establish that the services rendered or the advice given were below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Second, he must show that the deficiencies "actually had an adverse effect on the defense." *Strickland v. Washington*, 466 U.S. 668, 693 (1984). The error must be so serious as to render an unreliable result. *Id.* at 687. It is not necessary, however, that absent the deficiency, the trial would have resulted in an acquittal. *Id.* at 695. Should the petitioner fail to establish either factor, he is not entitled to relief. Our supreme court described the standard of review as follows:

> Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component.

Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

On claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v.*

State, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Claims of ineffective assistance of counsel are regarded as mixed questions of law and fact. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). When reviewing the application of law to the post-conviction court's factual findings, our review is de novo, and the post-conviction court's conclusions of law are given no presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001); *see also State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000).

A. Performance Prong

This court has held that "failure of counsel to discuss parole eligibility or the parole condition of successfully completing a sexual offender treatment program does not constitute ineffective assistance of counsel." *Ricky Rutledge v. State*, No. 01C01-9706-CC-00201, slip op. at 15 (Tenn. Crim. App., Nashville, July 2, 1998), *perm. app. denied* (Tenn. 1999) (basing holding upon the principle that "'silence by counsel' on 'any collateral consequences of a plea' does not 'fall below the range of competence demanded of attorneys in criminal cases,'") (quoting *Adkins v. State*, 911 S.W.2d 334, 350 (Tenn. Crim. App. 1994)); *see also Rickey Sams*, slip op. at 2 (holding that counsel provided effective assistance by informing guilty-pleading defendant of his release eligibility date, despite not informing him of the applicability and effect of the parole provision in Code section 40-35-503(c)); *Rogers Lamont McKinley v. State*, No. 03C01-9308-CR-00255, slip op. at 15 (Tenn. Crim. App., Knoxville, Aug. 17, 1994) (refusing to find that "the failure of the Defendant's attorneys to advise the Defendant of [the terms of Code section 40-35-503(c)] constituted ineffective assistance of counsel"). Thus, a defendant's counsel does not deficiently perform by remaining silent on the matter of the "collateral consequences" implicated by that defendant pleading guilty to sexual battery.

We must now point out, however, that *Ricky Rutledge* was "not a case, as in *Hill v. Lockhart* . . . in which counsel [had] given erroneous advice." *See Ricky Rutledge*, slip op. at 10 n.6. In the present case, however, counsel did in fact give erroneous advice, as opposed to merely remaining silent, when he told the petitioner that he would be on the sex offender registry for only ten years following the completion of his probation. In fact, the terms of the petitioner's guilty plea automatically included permanent inclusion on the sex offender registry. Criminal defense attorneys must conduct adequate legal research to remain in the required range of competence. *See Cooper v. State* 847 S.W.2d 521, 527-28 (Tenn. Crim. App. 1992). The fact that one convicted of sexual battery by an authority figure must remain registered as a sex offender for life was explicitly stated in the Tennessee Code. To the extent that counsel provided this bit of inaccurate advice, he performed deficiently in representing the petitioner.

B. Prejudice Prong

Our next inquiry is whether the petitioner has established the "prejudice prong" of *Strickland* and *Hill*. The petitioner testified at the evidentiary hearing that he would not have pleaded guilty had he known that he would be branded a sex offender for life. Counsel testified that he was admittedly deficient when he informed the petitioner that he could apply to be removed from the sex offender registry ten years after his probation ended. The post-conviction court found the petitioner's testimony to be credible, and we defer to its resolution of credibility issues. *See Massey v. State*, 929 S.W.2d 399, 403 (Tenn. Crim. App. 1996); *Taylor v. State*, 875 S.W.2d 684, 686 (Tenn. Crim. App. 1993).

The State argues that, as in *Alan Dale Bailey*, the probability that the petitioner might have received a more severe penalty following a trial indicates that the petitioner nevertheless would have pleaded guilty had he known all the relevant facts. We agree that the petitioner's sentences could well have been exacerbated by the imposition of a longer term of incarceration along with permanent inclusion on the sex offender registry. *See id.,* slip op. at 5; *see also Wade v. State*, 914 S.W.2d 97, 104 (Tenn. Crim. App. 1995); *Carl A. Jones v. State*, No. 02C01-9204-CC-00099, slip op. at 4 (Tenn. Crim. App., Jackson, Oct. 21, 1992) (stating that despite counsel's failure to acquaint petitioner with Code section 40-35-503(c), no prejudice was shown because petitioner "could not have avoided these requirements" by going to trial). However, the actual holding in *Alan Dale Bailey* was that the appellate court must defer to the post-conviction court's determination that Bailey's "but for" testimony was not credible. *Alan Dale Bailey*, slip op. at 15. Likewise, we must defer to the post-conviction court's finding in the present case that accredited the petitioner's testimony that he would not have pleaded guilty but for counsel's erroneous advice.

Therefore, for these reasons, we hold that the petitioner has established the performance and prejudice prongs promulgated in *Strickland* and *Hill*, and he consequently established his claim of ineffective assistance of counsel. Thus, the granting of post-conviction relief is affirmed.

_____

JAMES CURWOOD WITT, JR., JUDGE